

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT  
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CIVIL): AY  
CASE NO.: 502019AP000078CAXXMB  
L.T. NO.: 502016SC014569XXXXSB

MD NOW MEDICAL CENTERS, INC. d/b/a MD NOW,  
Appellant,

v.

AUTO-OWNERS INSURANCE COMPANY,  
Appellee.

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Opinion filed: October 8, 2020

Appeal from the County Court in and for Palm Beach County;  
Judge Reginald Corlew.

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PER CURIAM.

Plaintiff, MD Now Medical Centers, Inc., appeals a final judgment awarding Defendant, Auto-Owners Insurance Company, attorney's fees and costs pursuant to section 57.105, Florida Statutes. On appeal, Plaintiff argues that the fee judgment must be reversed because: (1) Defendant's Motion for Sanctions failed to comply with section 57.105's safe harbor provision; (2) the trial court failed to include the requisite findings of fact and law in its order granting Defendant's Motions for Sanctions and in its Final Order on Attorney's Fees and Costs; (3) the

trial court awarded Defendant attorney's fees in an amount greater than Defendant incurred; and (4) the trial court awarded costs as a sanction pursuant to section 57.105 although section 57.105 does not permit the recovery of costs. We agree with Plaintiff on all points and reverse.

### **BACKGROUND**

On December 21, 2016, Plaintiff sued Defendant for breach of contract. Although Plaintiff's claim was a workers' compensation claim, Plaintiff's complaint sought the recovery of no-fault benefits. Based on this error, Defendant served Plaintiff with an intent to move forward with sanctions pursuant to section 57.105, Florida Statutes ("safe harbor notice") via email on January 25, 2017. Twenty-three days later, Defendant filed its Motion for Sanctions with the trial court, arguing that it was entitled to attorney's fees because Plaintiff knew or should have known that its claim was without merit at the time it was filed.

Subsequently, Plaintiff filed a notice of voluntary dismissal without prejudice, and thereafter, Defendant filed a Motion for Entitlement to Attorney's Fees and Costs arguing that it was entitled to an award of attorney's fees and costs pursuant to section 57.105. In response, Plaintiff argued that the Motion for Sanctions was prematurely filed because Florida Rule of Judicial Administration 2.514(b) extended section 57.105's twenty-one day safe harbor period by five days. The trial court granted Plaintiff's Motion for Entitlement to Attorney's Fees and Cost without elaboration.

At the ensuing fee hearing, Defendant requested attorney's fees in the amount of \$450.00 per hour and further requested costs for an expert witness who appeared on behalf of Defendant at the fee hearing. Plaintiff argued that the trial court could not award \$450.00 per hour because Defendant's attorneys only billed \$125.00 per hour for the legal services rendered. Plaintiff further argued that costs were not recoverable as a sanction under section 57.105. In its Final Order for

Attorney's Fees and Costs, the trial court awarded Defendant \$15,300.00 in attorney's fees, \$1,571.18 in interest, and \$1,815.00 in costs associated with the expert witness. This appeal follows.

### **ANALYSIS**

Ordinarily, we review a trial court's order awarding attorney's fees or costs under an abuse of discretion standard; however, because the instant order involves a question of law, our review is de novo. *City of Boca Raton v. Basso*, 242 So. 3d 1141, 1144 (Fla. 4th DCA 2018) ("An appellate court reviews whether a trial court's award of costs is excessive for an abuse of discretion; however, whether a cost requested may be awarded, at all, is a question of law to be reviewed de novo." (quotation omitted)).

We begin by addressing Plaintiff's safe harbor argument. Section 57.105 permits a trial court to award attorney's fees to the prevailing party where the court finds that the losing party knew or should have known that its claim or defense was not supported by material facts or then-existing law. § 57.105(1), Fla. Stat. (2017). However, section 57.105(4) contains a safe harbor provision which states, in pertinent part, that:

[A] motion by a party seeking sanctions under this section must be served but may not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

The purpose of this safe harbor provision is to provide the non-moving party with a meaningful opportunity to avoid sanctions by withdrawing or amending meritless allegations or claims. *Bionetics Corp. v. Kenniasty*, 69 So. 3d 943, 948 (Fla. 2011).

With respect to the computation of time, Florida Rule of Judicial Administration 2.514 provides as follows:

(a) Computing Time. The following rules apply in computing time periods specified in any rule of procedure, local rule, court order, or statute that does not specify a method of computing time.

...

(b) Additional Time after Service by Mail. When a party may or must act within a specified time after service and service is made by mail or email, 5 days are added after the period that would otherwise expire under subdivision (a).

Fla. R. Jud. Admin. 2.514(a), (b). As this Circuit has previously held, because section 57.105 does not specify a method for computing time, the plain language of rule 2.514 indicates that a 5-day timeline extension is applicable to section 57.105's procedure for serving and filing motions for sanctions. *G&R Plumbing, Inc. v. Avatar Prop. and Cas. Ins. Co.*, 26 Fla. L. Weekly Supp. 945a (Fla. 15th Cir. Ct. Feb 5, 2019). As a result, when a party provides the opposing party with a section 57.105 safe harbor notice via email, rule 2.514(b) has the effect of extending the safe harbor period from twenty-one days to twenty-six days. *Id.*

In the instant case, Defendant served Plaintiff with a section 57.105 safe harbor notice by email on January 25, 2017. Per the plain language of rule 2.514(b), because the safe harbor notice was served via email, Plaintiff should have been given twenty-one days, plus five, to withdraw the challenged claim. *See McCray v. State*, 151 So. 3d 449, 450 (Fla. 1st DCA 2014) (explaining the two step process for the calculation of time under rule 2.514). However, Defendant prematurely filed its Motion for Sanctions with the trial court twenty-three days later, thereby violating the safe harbor period for Plaintiff to withdraw or amend its claim. Accordingly, the court erred in granting Defendant's motion. *City of N. Miami Beach v. Berrio*, 64 So. 3d 713, 715–16 (Fla. 3d DCA 2011). Therefore, we reverse the ensuing fee judgment.

Although our holding on the safe harbor issue is dispositive, we also write to address the trial court's lack of express findings, its decision to award Defendant more legal fees than incurred, and its award of costs as a sanction.

“Section 57.105 requires an explicit finding by the trial court that there was a complete absence of a justiciable issue of law or fact raised by the plaintiff in the action.” *Palm Beach Polo Holdings, Inc. v. Stewart Title Guar. Co.*, 134 So. 3d 1073, 1078 (Fla. 4th DCA 2014) (quoting *Vasquez v. Provincial S., Inc.*, 795 So. 2d 216, 218 (Fla. 4th DCA 2001)). In this case, the trial court’s order granting Defendant’s motion for fees lacked any such findings. The court’s Final Order on Attorney’s Fees and Costs also lacked these findings. The trial court’s failure to state this express finding in either of its orders is grounds for reversal. *Id.* (holding that because neither the order finding that the party was entitled to section 57.105 fees nor the order awarding the amount of fees contained any express findings of fact, the trial court reversibly erred).

The court’s award of attorney’s fees in an amount that was greater than what Defendant was charged by its trial counsel for the legal services rendered is also grounds for reversal as a trial court may not award attorney’s fees in excess of what was actually charged to the party. *Effective Teleservices, Inc. v. Smith*, 16 So. 3d 256, 256 (Fla. 4th DCA 2009); *Spagnolo v. Nicoletti*, 755 So. 2d 671, 671 (Fla. 4th DCA 1999). Likewise, the court’s award of costs as a sanction under section 57.105 was also reversible error as section 57.105 only provides for the award of attorney’s fees as sanctions and “makes no mention of costs.” *Ferdie v. Isaacson*, 8 So. 3d 1246, 1251 (Fla. 4th DCA 2009); *see* § 57.105, Fla. Stat. (2017). *See also Pronman v. Styles*, 163 So. 3d 535, 538 (Fla. 4th DCA 2015) (costs are not awardable under section 57.105).

Accordingly, we **REVERSE** the trial court’s award of attorney’s fees, interest, and costs in favor of Defendant.

CHEESMAN and COATES, JJ., concur.

HAFELE, J., concurs in result only.